



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Winning the Senate PAC
Jason F. Emert, Treasurer
P.O. Box 320843
Alexandria, Virginia 22320

APR 27 2016

RE: MUR 6893
Winning the Senate PAC and
Jason F. Emert in his official
capacity as treasurer

Dear Mr. Emert:

On October 31, 2014, the Federal Election Commission notified Winning the Senate PAC and you in your official capacity as treasurer ("Winning the Senate"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and information supplied by Paul E. Sullivan, Esq., the Commission on April 12, 2016, found that there is reason to believe that Winning the Senate violated 52 U.S.C. § 30124(b), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you wish to have Mr. Sullivan or any other attorney represent Winning the Senate in this matter, please complete the enclosed Designation of Counsel and have the attorney return the form to us.

Please note that you have a legal obligation to preserve all documents, records, and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General

Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

On behalf of the Commission,



Matthew S. Petersen
Chairman

Enclosures
Factual and Legal Analysis

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENTS:** Winning the Senate and **MUR 6893**
6 Jason F. Emert in his official capacity
7 as treasurer
8
9

10 **I. INTRODUCTION**

11 This matter was generated by a complaint filed with the Federal Election Commission by
12 Rand Paul for U.S. Senate 2016 (the "Committee") alleging violations of the Federal Election
13 Campaign Act of 1971, as amended (the "Act"), by Winning the Senate PAC and Jason F. Emert
14 in his official capacity as treasurer ("WTS").

15 The Committee alleges that WTS, an independent expenditure-only political committee,
16 solicited funds in an e-mail that falsely indicates that Paul and three other U.S. Senators had sent
17 it. The Committee represents that Paul did not authorize the use of his name in connection with
18 WTS's solicitation and is not affiliated with the entity. The Committee therefore contends that
19 WTS fraudulently misrepresented that it was writing, speaking, or otherwise acting on behalf of
20 Paul in its e-mail solicitation. WTS denies that it violated the fraudulent misrepresentation
21 provision of the Act.

22 As described below, the e-mail solicitation of WTS provided with the Complaint falsely
23 represents that it was sent "from" or on behalf of four federal candidates by name.¹ The e-mail
24 therefore reasonably suggests that those named federal candidates endorsed the solicitation when
25 in fact they had not — a material representation calculated to deceive a person of ordinary

¹ The four named individuals were all U.S. Senate candidates at the time of WTS's October 12, 2014 e-mail. See Ted Cruz FEC Form 2, Statement of Candidacy ("SOC") (2018 Senate election) (June 17, 2014); Rand Paul SOC (2016 Senate election) (Aug. 9, 2013); Mike Lee SOC (2016 Senate election) (Oct. 4, 2011); Marco Rubio SOC (2016 Senate election) (Nov. 17, 2010).

1 prudence and comprehension. Accordingly, there is reason to believe that WTS may have
2 violated 52 U.S.C. § 30124(b), the provision of the Act that proscribes fraudulently writing or
3 otherwise acting on behalf of a federal candidate in connection with a solicitation.

4 II. FACTUAL AND LEGAL ANALYSIS

5 A. Statement of Facts

6 WTS registered with the Commission on September 10, 2014, identifying itself as an
7 independent expenditure-only political committee.² Through the end of 2014, WTS disclosed
8 accepting \$114,694 in contributions and making \$40,064 in independent expenditures.³ Its
9 operating expenditures totaled \$64,678, the majority of which paid for website expenses,
10 fundraising commissions, a list rental, and credit card processing fees.

11 The Complaint attaches a copy of an e-mail dated October 12, 2014, bearing the by-line
12 "From: Cruz/Paul/Lee/Rubio (Senate)" followed by the reply address, "[mailto:stokes@
13 winningthesenate.com]".⁴ The subject line of the e-mail states, "We know you ignored this
14 email on Friday. Take a look now."⁵ The body text, written also in the first-person plural, urges
15 its recipient to provide "support in securing a Republican victory come November" above a copy
16 of what it describes as the "last message." That embedded e-mail message in turn contains the
17 same by-line, "From: Cruz/Paul/Lee/Rubio (Senate)," but does not reflect a reply e-mail

² See WTS Statement of Organization (Sept. 10, 2014).

³ See WTS 2014 Year End Report at 2-5 (Jan. 30, 2015). To date, WTS has not responded to two Requests for Additional Information of the Reports Analysis Division sent April 26, 2015.

⁴ Compl., Ex.

⁵ *Id.* at 1.

1 address.⁶ The body of the embedded e-mail, again in the first-person plural, expressly solicits
2 contributions in connection with six Senate races that “will make a difference,” recommending
3 that the reader “Donate \$25” for each.⁷ The e-mail ends with the statement, “Help elect
4 conservatives who will join Mike Lee, Rand Paul, Ted Cruz, Marco Rubio, and others to end our
5 national nightmare,” followed by the name “T.J. Stokes, Winning the Senate.”⁸ WTS’s name,
6 address, and website appear at the foot of the e-mail.⁹ Below that, a disclaimer states, “Paid for
7 by Winning the Senate PAC. Not authorized by any candidate or candidate’s committee.”¹⁰ The
8 e-mail also provides an internet address for WTS at www.winningthesenate.com — the same
9 domain name used in the reply-to address on the October 12, 2014, e-mail. WTS maintains a
10 website at that address that allows visitors to make contributions to WTS directly.¹¹

11 The Complaint contends that the Commission has concluded that even “merely implying
12 affiliation with a candidate or committee in the course of fundraising is a violation” of the
13 fraudulent misrepresentation provision of the Act, and that WTS “did more than that here,
14 affirmatively representing to solicitation recipients that its fundraising email was ‘from’ Senator

⁶ *Id.*

⁷ *Id.* at 2. According to its filings with the Commission, WTS made \$40,064 in independent expenditures in support of three of the identified candidates and on behalf of three others not included in the e-mail. *See* WTS Reports of 24-Hour Independent Expenditures (Oct. 31, Nov. 3, and Dec. 2, 2014).

⁸ *Id.*

⁹ *Id.* at 3.

¹⁰ *Id.* The hard copy version of the e-mail provided with the Complaint also appears to include certain hyperlinks to a website, although the internet addresses related to those links is not visible.

¹¹ *See* Compl., Ex.; www.winningthesenate.com (last visited July 6, 2015). WTS’s website was no longer accessible as of July 23, 2015.

1 Paul and others.”¹² The Complaint further represents that “Senator Paul did not authorize the use
2 of his name and is not affiliated with the PAC,” and argues that “[a]ny ‘fine print’ the PAC
3 might have included in its fundraising email cannot paper over the fact that this solicitation was
4 deliberately structured to make recipients think that Senator Paul and others were asking for their
5 money.”¹³

6 In its Response, WTS asserts that it retained HardenGlobal LLC in 2014 to “assist with
7 an internet project to solicit contributions and make expenditures in eighteen (18) states,”
8 including “launching the [WTS] website and the transmission of a series of email fundraising
9 solicitations on behalf of [WTS].”¹⁴ In support of its assertions, WTS also provided the signed
10 and sworn affidavit of an employee of HardenGlobal.¹⁵ That affidavit represents that WTS
11 contracted with HardenGlobal to launch the WTS website and to “send out a series of
12 fundraising email solicitations for contributions to WTS.”¹⁶ According to WTS, neither the e-
13 mail dated October 10, 2014, nor the “re-sent” e-mail dated October 12, 2014, which was
14 provided with the Complaint, were distributed with the intent to mislead or confuse recipients
15 “into believing the email originated from any of the Senators named in the ‘From’ line.”¹⁷ WTS
16 states that the original e-mail generated \$9,084 in contributions and the subsequent e-mail

¹² Compl. at 1 (citing MUR 5472 (Republican Victory Committee, Inc.)).

¹³ *Id.* at 1-2.

¹⁴ Resp. at 1-2.

¹⁵ See Resp., Ex. A, Aff. of Andrew Ransom (May 21, 2015) (“Ransom Aff.”) (HardenGlobal employee who worked on WTS fundraising).

¹⁶ Ransom Aff. ¶ 7; see also Resp. at 2.

¹⁷ Resp. at 2.

1 generated another \$16,627.¹⁸ WTS also asserts that on October 14, 2014, it received a cease-
2 and-desist letter from Senator Paul regarding the October 12 e-mail and that it complied with that
3 request.¹⁹

4 **B. There is Reason to Believe that WTS Fraudulently Misrepresented that a**
5 **Candidate for Federal Office Sent and Endorsed its Solicitation**
6

7 The Act and Commission regulations prohibit persons from “fraudulently
8 misrepresent[ing] the person as speaking, writing, or otherwise acting for or on behalf of any
9 candidate or political party or employee or agent thereof for the purpose of soliciting
10 contributions or donations[.]”²⁰ “[A] representation is fraudulent if it was reasonably calculated
11 to deceive persons of ordinary prudence and comprehension.”²¹

12 Here, WTS was responsible for engaging in an on-line fundraising campaign using e-mail
13 solicitations that expressly represented that four U.S. Senators sent the message — that it was
14 “from” those candidates. One of those four federal candidates has now informed the
15 Commission through its statutory complaint procedure that he did not in fact consent to the use

¹⁸ *Id.* at 3; Ransom Aff. ¶¶ 10, 11. Ransom attests that a verbal agreement between WTS and HardenGlobal provided that WTS would pay HardenGlobal a 15% commission for its services. *See id.* ¶ 10. WTS’s disclosure reports reflect that it received \$114,694 in contributions, and that it paid Harden Global \$29,195 for “fundraising commissions.” *See* WTS 2014 Year-End Report at 3 (total contributions), 2014 Pre-General Report at 19-20 (HardenGlobal commission payments), 2014 Post-General Report at 27 (same). If that 15% figure is accurate, then WTS may in fact have received as much as \$194,633 in contributions in connection with HardenGlobal’s activities on its behalf, absent other facts.

¹⁹ *See* Resp. at 3; Ransom Aff. ¶ 14.

²⁰ 52 U.S.C. § 30124(b)(1); 11 C.F.R. § 110.16(b)(1).

²¹ *FEC v. Novacek*, 739 F.Supp.2d 957, 961 (N.D. Tex. 2010). *Cf. United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004) (citing, *inter alia*, *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954) (holding that in a scheme devised with the intent to defraud, the fact that there is no misrepresentation of a single existing fact makes no difference in the fraudulent nature of the scheme)).

1 of his name in connection with the solicitation in any way.²² In addition to that express
2 misrepresentation concerning its source, the language of the communication was also designed to
3 cause its recipients to conclude that the named candidates together jointly endorsed the
4 solicitation: “[l]et me know if *we* can count on your support;” “*We’re* being outspent by
5 Democrats;” “*We* are on the verge of pulling ahead.”²³

6 Moreover, the misleading nature of the e-mail (that is, that the named candidates sent and
7 endorsed the solicitation) is not cured by those features of the e-mail that indicate that WTS
8 would receive the funds and that the named candidates did not “authorize” the solicitation.²⁴ The
9 suggestion of a U.S. Senator’s endorsement of a political fundraising solicitation — indeed, four
10 such senators speaking in one voice — may be particularly material to the recipient of such a
11 request concerning the decision whether to contribute.²⁵ Presumably that is why WTS and its
12 agents framed the solicitation as they did. But that there is no additional misrepresentation that
13 the funds would be received by the candidates does nothing to lessen the materiality of the false
14 representation that the named candidates sent and endorsed the solicitation generally.

²² In this sense, the present matter is similar to MUR 6427 (*Unknown Respondents*), in which the Commission found reason to believe that unknown respondents violated section 441h(a) (recodified at 30124(a)) based also on the putative source of an e-mail that delivered a fraudulent message in the name of a federal candidate. The e-mail’s “from” line in that matter stated, “From: Scott Eckersley (mailto:scott.eckersley@yahoo.com),” and the body of the e-mail was written in the first-person voice, as here. But in fact Eckersley, the candidate, had not sent the e-mail; rather it was sent by another person, as determined in the Commission’s investigation.

²³ See Compl., Ex. (emphasis added).

²⁴ Specifically, the e-mail identifies WTS’s domain name in its reply address “[mail to:stokes@winningthesenate.com],” identifies the organization in the valediction “T.J. Stokes, Winning the Senate,” includes a disclaimer that names WTS, and provides a physical and website address for WTS at its foot.

²⁵ The Supreme Court has held that a statement is material if it has “a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.” *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

1 Likewise, the existence of a Commission-required disclaimer in this instance does not
2 necessarily negate the deceptive nature of the message concerning the candidates' putative
3 involvement.²⁶ The assertion that none of the named candidates may ultimately have
4 "authorized" the communication, an otherwise undefined term, is not inconsistent with a
5 reasonable belief that nonetheless the named candidates supported or endorsed the solicitation —
6 especially where the communication expressly states that those candidates sent it and the
7 solicitation is written in a voice designed to perpetuate the belief that they personally supported
8 its message. Indeed, the Commission has recognized that a disclaimer will not necessarily
9 negate intent to deceive depending upon the particular circumstances presented. In MUR 5472,
10 the Republican Victory Committee mailings at issue contained a disclaimer, but the Commission
11 nevertheless found that respondents knowingly and willfully violated section 441h(b) (recodified
12 at section 30124(b)).²⁷

13 This matter is readily distinguishable from others in which the Commission has declined
14 to proceed on a fraudulent misrepresentation theory. For instance, in MURs 6633, 6641, 6643,
15 6645, the Commission recently found no reason to believe that a series of unauthorized entities
16 purporting to raise funds on behalf of congressional candidate Allen West fraudulently
17 misrepresented that they were acting on West's behalf. In those cases, however, the solicitations
18 did not falsely suggest that West himself sent or endorsed the solicitation. The circumstances
19 here also differ from those in MUR 5853 (Roth for Congress). In MUR 5853, the Commission

²⁶ See Compl., Ex. at 3. If the solicitation e-mail was sent to more than 500 recipients, it required a disclaimer within a box. See 52 U.S.C. § 30120(a), (c)(2); 11 C.F.R. § 110.11(a)(1), (c)(2)(ii).

²⁷ See Factual & Legal Analysis at 4 n.2, 9, 11, MUR 5472.

1 found no reason to believe an individual violated section 441h(a) (recodified at section 30124(a))
2 by disseminating a satirical letter purportedly written by the candidate, but that obviously was
3 not. Unlike that matter, the message of the solicitation here appears in earnest and, taken as a
4 whole, to be designed to convey that the named candidates sent it or at least endorsed the
5 message.

6 We also find unconvincing WTS's assertion in its Response that it did not intend to
7 mislead or confuse recipients into believing that the "from" line of the e-mail meant what it
8 said.²⁸ This assertion appears inconsistent with the objective manifestation of its intent reflected
9 in the express language of the solicitation and the message it apparently was designed to convey.

10 Thus, taking the communication as a whole, the Commission concludes that a reasonable
11 person would believe that the four Senators named as the solicitation's source at the very least
12 endorsed the solicitation. And by crafting its solicitation to falsely represent that material fact,
13 WTS fraudulently misrepresented that it was "speaking, writing, or otherwise acting for or on
14 behalf of" Paul and the other named federal candidates "for the purpose of soliciting
15 contributions or donations."

16 While the Response provides information about the amount of contributions raised as a
17 result of this particular fraudulent e-mail solicitation, the Commission does not know the full
18 scope of WTS's activities. WTS acknowledges that its fundraising campaign involved a
19 solicitation effort that spanned 18 states, and a representative of its vendor, HardenGlobal,
20 confirms that the vendor was retained to circulate "a series of fundraising email solicitations for

²⁸

See Resp. at 2; Ransom Aff. ¶ 9.

1 contributions to WTS.”²⁹ WTS also states that it raised \$16,627 from the e-mail provided with
2 the Complaint and \$9,084 from the original e-mail it had sent two days before, for a total of
3 \$25,711.³⁰ WTS has reported total contributions of \$114,694, however, suggesting additional
4 likely solicitations. Therefore, the Commission finds reason to believe that WTS violated
5 52 U.S.C. § 30124(b).

²⁹ Ransom Aff. ¶ 7.

³⁰ Resp. at 3.